Supreme Court, U.S.
FILED
JUL 28 1992
OFFICE OF THE CLERK

No. 91-2000

In The

Supreme Court of the United States

October Term, 1992

JAMES M. MULLIKIN, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITIONER'S REPLY BRIEF

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ARGUMENT

The Government in its brief in opposition makes two arguments why the court of appeals' opinion in *Mullikin v. United States*, 952 F.2d 920 (6th Cir. 1991) is correct and not in conflict with the decisions of this Court or any other circuit. First, the Government argues 28 U.S.C. §2462 does not apply to administrative acts to enforce penalties, but instead prohibits only untimely judicial actions. Second, it argues that the court of appeals' opinion is not in conflict with *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976), because Congress made the necessary "clear" and "affirmative"

showing of its intent to override the application of 28 U.S.C. §2462 to tax shelter penalties[1] by enacting 26 U.S.C. §6502 (the statute of limitations on the collection of timely assessed penalties by judicial actions). *Strangely, the Government does not claim, as did the court, that 26 U.S.C. §6701, itself, contained the clear and affirmative expression of Congressional intent necessary to override 28 U.S.C. §2462.*

In fact, although the Government made both of these arguments before the court of appeals below, neither of the arguments appears to be part of the rationale relied on by the court.[2] This is particularly troubling because the Government appears to be either obfuscating the court's rationale or resurrecting arguments not relied on by the court of appeals to bolster an opinion that is clearly erroneous. In any event, for the reasons set forth

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[1] The impact of the Government's argument is that 26 U.S.C. §6502 preempts the application of 28 U.S.C. §2462 not only to tax shelter penalties but to all penalties under the Internal Revenue Code.

[2] Clearly, the court of appeals stated that it found it unnecessary to address the Government's argument that 28 U.S.C. §2462 does not bar the assessment of tax shelter penalties because the act of assessment is purely an administrative act and thus, not within the compass of 28 U.S.C. §2462. *See, Mullikin v. United States, supra,* at 929-930, footnote 17. Likewise, although the circuit court's opinion mentions 26 U.S.C. §6502 in its analysis of 26 U.S.C. §6703(c), it does not appear to either address or adopt the Government's contention that 26 U.S.C. §6502, in effect, preempts the application of 28 U.S.C. §2462 to both the administrative and judicial enforcement of tax shelter penalties. *Id.* at 929.

below, both of these arguments are patently wrong and should be rejected as a basis to deny Mullikin's petition.

There is abundant authority from this Court (*Bowers v. New York & Albany Lighterage Co.*, 273 U.S. 346 (1927)) and three circuits (1st, 2nd, and 5th) that 28 U.S.C. §2462 applies to administrative acts to enforce penalties as well as judicial actions. 28 U.S.C. §2462 is a broad statute that applies to both administrative and judicial "proceedings.".[3] The administrative actions, including the assessment of the penalties, taken by the Government in this case to enforce the tax shelter penalties are clearly covered by the statute. Furthermore, because 28 U.S.C. §2462 applies to both administrative and judicial acts and 26 U.S.C. §6502 does not, 26 U.S.C. §6502 cannot constitute the "clear" and "affirmative" Congressional Act required by *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976) to override the application of 28 U.S.C. §2462 to the administrative enforcement of penalties.

1. Proceedings.

28 U.S.C. §2462 applies, in part, to a "proceeding" to enforce penalties. The word "proceeding" has been viewed broadly by the courts. For example, in *Rice v.*

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[3] It is not surprising that 28 U.S.C. §2462 is written broadly with the intention of having broad application. Because it potentially applies to all penalties levied under the United States Code, the statute must be written broadly to cover the myriad of administrative and judicial procedures promulgated in the United States Code and Governmental regulations to enforce penalties.

United States, 356 F.2d 709 (8th Cir. 1966), the court considered the word "proceeding" as used in 18 U.S.C. §1505 (obstruction of justice statutes) and noted that in interpreting a statute, the words of the statute should be given their common usage, unless to do so would produce an absurd result. With that in mind, the court stated the common usage of the word "proceeding" was as follows:

> "Proceeding" is a comprehensive term meaning the actions of proceeding – *a particular step or series of steps,* adopted for accomplishing something. This is a dictionary definition as well as the meaning of the term in common parlance. Proceedings before a governmental department or agency simply mean proceeding in the manner and form prescribed for conducting business before the department or agency, including all *steps and stages in such an action from its inception to its conclusion. Id.* at 712. (Emphasis added.)

This Court in *Bowers v. New York & Albany Lighterage Co., supra,* has also concluded that the word "proceeding" has a broad meaning in the context of a statute of limitations applicable to tax collection efforts by the Government. In *Bowers, supra,* the Court held that the word "proceeding" as used in §250(d) of the Legislative Act of 1921, 42 Stat. 263, included *administrative* efforts by the Government to collect taxes by levy (distraint).

In so holding, the Court noted the purpose of the statute of limitations on the collection of taxes "was to fix a time *beyond which steps* to enforce collection might not be initiated." *Id.* at 349. (Emphasis added.) The Court also stated that, "[a] reasonable view of the matter is that it was the intention of Congress by the clause here in question to protect taxpayers against *any proceeding whatsoever*

for the collection of tax claims not made or pressed within five years." *Id.* at 351 (Emphasis added.)

Moreover, all courts that have addressed this question have concluded that 28 U.S.C. §2462 applies to *administrative* acts as well as judicial acts to enforce penalties. In *United States v. Meyer,* 808 F.2d 912 (1st Cir. 1987), the court observed that both the Government and the defendant agreed that under 28 U.S.C. §2462, "*administrative* action aimed at imposing a civil penalty must be brought within five years of the alleged violation." *Id.* at 914. (Emphasis added.) The court, in concurring with that agreement, relied on *Lancashire Shipping Co. v. Durning,* 98 F.2d 751 (2d Cir. 1938), *cert. denied,* 305 U.S. 635 (1938), wherein "the court held that the time requirement of the statute[4] was satisfied when the *administrative* proceeding – though not the judicial proceeding – was brought within the prescribed limitation period." *United States v. Meyer, supra,* at 914. (Emphasis added.)

Additionally, the United States Court of Appeals for the Fifth Circuit in *United States v. Core Laboratories, Inc.,* 759 F.2d 480 (5th Cir. 1985) recognized that the provisions of 28 U.S.C. §2462 apply to *administrative* proceedings to enforce penalties. The court in *Core Laboratories, supra,* noted that the legislative history of the Export Administrative Act, 50 U.S.C. §2401, *et. seq.,* specifically states that

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[4] The statute involved was 28 U.S.C. §791, App. to Pet., *infra,* at 59, the forerunner to 28 U.S.C. §2462.

the statute of limitations of 28 U.S.C. §2462 applies both to *administrative* and judicial proceedings. *Id.* at 482-483.[5]

The weight of this authority leads to the conclusion that 28 U.S.C. §2462 does apply to administrative acts to enforce penalties. Furthermore, based on this authority, it appears by using the word "proceeding", Congress intended the statute of limitations contained in 28 U.S.C. §2462 to apply to any "step" or "stage" in the penalty enforcement process. *Rice v. United States, supra,* at 712.

In this case, just as in *Bowers, supra,* it would appear to be a reasonable view that Congress intended to protect the individuals in question *"against any proceeding whatsoever"* for the enforcement of tax penalties not made or pressed within five years. *Bowers, supra,* at 351. (Emphasis added.) The application of these principles to the current case makes clear that the *administrative* assessment of the tax shelter penalties are within the purview of 28 U.S.C. §2462.

All of the steps in the enforcement process for tax shelter penalties, both administrative and judicial, are statutorily prescribed and subject to Treasury regulations, Internal Revenue Service rules and case law. They are substantial, interrelated and interdependent steps in a "proceeding" by the Government to enforce tax shelter

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[5] The Government in footnote 4 to its brief in opposition appears to represent that *Core Laboratories, supra,* involved only judicial actions to enforce penalties and has no relevance to the administrative enforcement of penalties under 28 U.S.C. §2462. Such an assertion is totally without merit. The court in *Core Laboratories, supra,* specifically and favorably addressed the application of 28 U.S.C. §2462 to administrative efforts to enforce penalties.

penalties. The assessment of the penalties is an integral part of the whole proceeding, just as the filing of a complaint is an integral portion of a law suit. In his dissent in *Mullikin, supra,* Judge Boggs recognized this and stated as follows:

> . . . the court's opinion states that there is no need to address the argument that §2462 could not apply as a bar to an action on a penalty assessment because such assessment was neither an "action" nor a "proceeding for the enforcement of any civil penalty". I would reject this argument because the assessment is a prerequisite to, and thus part of, the measures for the enforcement of a civil penalty. It would seem quite odd to say that the very act that initiates the actions leading to the collection of the penalty, a stream of events that must at some point be a proceeding, is not itself part of the proceedings. *Id.* at 933, dissenting footnote 1.

Accordingly, based on these authorities, Mullikin submits that the administrative assessment of the penalties is an integral step in a "proceeding" to enforce penalties, and is therefore within the purview of 28 U.S.C. §2462. This step was not taken within five years of the violation. The argument of the Government and any holding of the court of appeals in *Mullikin, supra,* to the contrary, are in conflict with the decisions of this Court and at least three other circuits. As such, they constitute another reason why the court of appeals' decision in this case warrants review.

2. Colorado River.

As shown by the discussion above, a proceeding to enforce a tax penalty is much broader than the filing of a law suit by the Government to collect the penalty once it has been finally determined to be owing. Pursuant to applicable statutes, regulations, and Internal Revenue Service rules, there are substantial administrative proceedings that must be timely conducted before the Government can judicially attempt to collect the penalty. For example, in the case of the enforcement of tax shelter penalties, an administrative assessment must first occur and the individual must be given a right to administratively contest the penalty before the Internal Revenue Service. This process involves administrative fact-finding, conferences, and negotiation.

All of this activity constitutes a proceeding to which 28 U.S.C. §2462 applies. Because 28 U.S.C. §2462 applies to both administrative and judicial acts to enforce penalties, including the administrative assessment of those penalties, it has broader application than 26 U.S.C. §6502, the provision of the Internal Revenue Code which limits the commencement of proceedings in court to collect the penalties once they have been timely assessed and the administrative and judicial contest over the penalties has been completed. In fact, 26 U.S.C. §6502 is specifically conditioned upon a timely assessment of a penalty being previously made.[6] Additionally, 26 U.S.C. §6703(c) makes

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[6] 26 U.S.C. §6502, in pertinent part, provides: (a) LENGTH OF PERIOD. – *Where the assessment of any tax imposed by this*

(Continued on following page)

clear that in the case of tax shelter penalties, 26 U.S.C. §6502 is further conditioned upon a final determination under that section that the penalties are due.

Because 26 U.S.C. §6502 does not apply to the administrative enforcement of the penalties, including timely assessment, it cannot be viewed as the "clear" and "affirmative" Act of Congress necessary to override the application of 28 U.S.C. §2462 to the administrative enforcement of the penalties as required by *Colorado River, supra.* Rather, under the tenets of that case, a subsequent statute will only be deemed to override a general statute, if the two statutes are irreconcilable. Here, they are not. While it is apparent that 26 U.S.C. §6502 is the clear Act of Congress necessary to override the application of 28 U.S.C. §2462 to the judicial collection of the penalties once they have been administratively and judicially determined to be owing, 26 U.S.C. §6502 specifically does not attempt to "abrogate" the application of 28 U.S.C. §2462 to administrative proceedings to enforce penalties. Accordingly, as set out in the petition, the court of appeals' decision in *Mullikin, supra,* to the contrary, is in direct conflict with this Court's decision in *Colorado River, supra,* and the Fifth Circuit's decision in *Core Laboratories, supra.*

(Continued from previous page)

title has been made within the period of limitations properly applicable, such tax may be collected by levy or by a proceeding in Court, but only if the levy is made or the proceeding begun –

(1) within 6 years after the assessment of the tax . . .

(Emphasis added.)

Moreover, it cannot be forgotten that the court in *Mullikin, supra,* did not rely on this argument but instead explicitly stated it relied on the *silence* in 26 U.S.C. §§6701 & 6703 as to a statute of limitations to conclude that those statutes had overridden 28 U.S.C. §2462. The present argument raised by the Government appears to be designed to bolster the clearly erroneous rationale of the court in *Mullikin, supra.* Nevertheless, neither the court's rationale of silence, nor the Government's argument, that 26 U.S.C. §6502 constitutes the clear Act of Congress necessary to override 28 U.S.C. §2462, is valid.

CONCLUSION

For the foregoing reasons and the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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